United States Court of Appeals

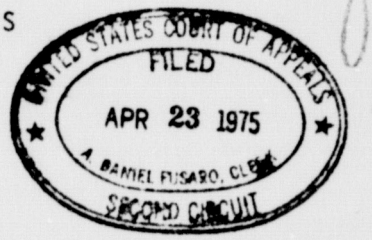
for the Second Circuit

RESPONSES TO PETITION FOR REHEARING

74-1402

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



BARBARA WISDOM, ET AL	)	
	)	
Plaintiffs-Appellees	)	
	)	
VS.	)	DOCKET NO: 74-1402
	)	
NICHOLAS NORTON, ET AL	)	
	)	
Defendants-Appellants	)	

APPELLANTS' REPLY TO APPELLEES' PETITION FOR A REHEARING

IT IS UNNECESSARY TO REMAND THE PRESENT CIVIL ACTION TO A 3-JUDGE COURT TO DECIDE THE CONSTITUTIONAL ISSUE.

Burns v. Alcala, 43 L.W. 4374 (March 18, 1975) has sustained this Court's decision in Wisdom v. Norton, 507 F.2d 750, that indigent pregnant women are not statutorily eligible for AFDC.

Because neither the District Court nor the Court of Appeals in Burns considered the constitutional claim, the

Supreme Court has remanded that case for consideration of the equal protection and due process claims.

The question now arises in the present civil action as to whether this case should be remanded for a 3-judge court hearing although this Court appeared to have already made a decision on the constitutional argument, Wisdom, supra, pages 758-759.

Admittedly, constitutional questions should be decided by a 3-judge court pursuant to 28 U.S.C. 2281. However, there are exceptions, and the defendant, Welfare Commissioner, believes that this case fits within the framework of two of these exceptions.

A 3-judge court is not necessary where the constitutional claim is "wholly insubstantial", Bailey v. Patterson, 369 U.S. 31, 33, or is "so attenuated and insubstantial as to be absolutely devoid of merit". Baker v. Carr, 369 U.S. 186, 199.

To understand why this exception should be applied, the Court must carefully examine just what claims the plaintiffs are making here. They are not claiming that they have a constitutional right to welfare; a claim that has never been definitely passed upon. What they are claiming is that they have a constitutional right to force a state to pick the type of welfare program the plaintiffs prefer.

The evidence showed that the plaintiffs were entitled as indigent persons to general assistance from the town welfare department pursuant to Section 17-273 of the Connecticut General Statutes and to medical assistance from the town welfare department under Section 17-274 of the Connecticut General Statutes. (See Appellants' Appendix 1 attached to this Brief).

The undisputed testimony was that these pregnant women were actually on the general assistance program (one plaintiff was already on the AFDC program) and as

such, were entitled to all obstetrical and gynecological services (Appendix to Brief of Appellants, Page 2a) besides receiving money for food, clothing, personal needs and rent.

The Supreme Court decisions of Dandridge v. Williams, 397 U.S. 471 and Jefferson v. Hackney, 406 U.S. 535, are so clearly dispositive of the plaintiffs' equal protection claims as to render them to be without merit.

First, these cases set the standards necessary for states to comply with in welfare cases, and that test is that the state's action be rational and free from invidious discrimination. The state action, to be constitutional, does not have to be a wise one, or one that the judges might choose, only that it have some rational basis.

Second, these cases stand for the proposition that the sate does not have to attack every welfare problem but may choose to deal with some and not deal with others at all. In this case, Connecticut has actually faced the

problem of pregnant indigent women by making them immediately eligible for general assistance.

Indigent pregnant women have not been discriminated against in comparison to indigent women with children whose husbands have left the home because the underlining purpose of the AFDC program is to have children brought up in a family home and not in an institution such as an orphanage, see Burns, supra, page 4376, and further, they would not have to be brought up in a family home with just the mother but could be brought up with any specified designated relative.

Connecticut chose general assistance instead of AFDC for pregnant women for several good reasons. One of the reasons is that the state does not have to furnish the various social services to these women which would be mandated under the AFDC program, and, therefore, the state does not need the staff which is necessary when one gets into the complexities that arise by taking the federal matching dollar.

All Connecticut needs for the general assistance program is auditors who see that the towns are spending the money properly, and, if they are, then the state reimburses the towns four times a year.

Further, if the pregnant woman is able, she can be asked to work under the general assistance work relief program. Section 17-281 of the Connecticut General Statutes.

If she works under the general assistance program, it is not necessary to pay her the incentive earnings that are required pursuant to 42 U.S.C. 602(a)(8)(A)(ii), a program clearly not to the liking of the State Welfare Department, particularly as interpreted by federal regulations. Connecticut State Department of Public Works v. Department of Health, Education and Welfare, 448 F.2d 209. These federal incentive earnings programs are mathematically complicated to budget, require extra administrative help, and cause many of the administrative fair hearings for the department. Connecticut avoids all these problems under the general assistance program.

More importantly, if this Court were to find that the plaintiffs had a constitutional right to pick the public assistance program they prefer, when it is optional on the state, the results, when carried to their logical conclusion, would be ludicrous.

If indigent pregnant women, who are now eligible or on general assistance, are constitutionally eligible for AFDC, it logically follows that states like Connecticut, who have for a number of years rejected the optional provisions of 42 U.S.C. 607 entitled "Dependent Children of Unemployed Fathers", cannot now constitutionally deny unemployed or underemployed fathers the right to apply for this program. This program, instead of being optional, would now become mandatory by constitutional fiat. And, although these men are presently eligible for general assistance, they would now force the state to take a federal program they did not want.

Other optional programs that the state could now be constitutionally required to join would be 42 U.S.C. 701-708, "The Maternal Health and Child Care Program", and 42 U.S.C. 1396, "The Medical Assistance Program".

Forcing the states to join what Congress has long characterized as voluntary in this field of federal-state co-operation would be a clear violation of the state's Eleventh Amendment rights because it would be giving the plaintiffs a right to sue the states and force them to expend money to join federal public assistance programs that they had no desire to join.

Finally, the defendants claim that there is no equal protection violation because there is no real party at interest in this case. The real party, which is the fetus, has been held by the Supreme Court in Roe v. Wade, 410 U.S. 113, 158, as unable to maintain a claim under the Equal Protection Clause of the Fourteenth Amendment.

The plaintiffs are only eligible for AFDC in their capacity as supervising relatives or caretakers. In fact, until 1950 there were no payments made to supervising relatives. To make the named plaintiffs, who are mothers, real parties in interest, would be grossly unfair to all the other supervising relatives who are biologically stopped from being supervising relatives of fetuses.

A 3-judge court is not necessary to hear plaintiffs' due process argument, not only because it is without merit, but also the unsoundness of the constitutional claim "so obviously results from previous decisions of the (Supreme Court) as to foreclose the subject". Exparte Poresky, 290 U.S. 30, 32.

The Court should keep in mind that it does not have to be the precise claim but merely a similar one. Hagans v. Lavine, 415 U.S. 528, 539.

There is no due process violation because Goldberg v. Kelly, 397 U.S. 254, has stated that the basis for

welfare recipient's due process claims is that loss of welfare benefits which "deprives them of the very means by which to live". See this interpretation of Goldberg v. Kelly in Brown v. Lynn, 385 F.Supp. 986. Gonzales v. Vowell, 361 F.Supp. 1230, 1234-1235.

Here the plaintiffs have suffered no grievous loss nor have they been deprived of the very means by which to live because they are immediately eligible for general assistance under the public assistance program as they are indigent. Further, there is no evidence in this case that the general assistance program pays less in benefits than the AFDC program. Even if it did pay a lesser sum, as Brown, supra, and Gonzales, supra, point out, the payment of a lesser sum is not a grievous loss within the contemplation of Goldberg v. Kelly.

Respectfully submitted,

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CERTIFICATION

This is to certify that on the 22nd day of April, 1975, a copy of the Appellants' Reply to Appellees' Petition for a Rehearing was mailed to the following counsel of record:

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Sec. 17-267. When not changed by marriage. Section 17-267 is repealed.

(1949 Rev., S. 2579; 1961, P.A. 425, S. 6.)

Sec. 17-268. Children of state paupers. Section 17-268 is repealed.

(1949 Rev., S. 2580; 1961, P.A. 425, S. 6.)

Sec. 17-269. Return of person belonging to another state. Section 17-269 is repealed.

(1949 Rev., S. 2581; 1953, S. 1424d; 1959, P.A. 28, S. 56; 216; 1963, P.A. 501, S. 4.)
See Sec. 17-2d.

Sec. 17-270. Removal of persons settled in other towns. Section 17-270 is repealed.

(1949 Rev., S. 2582; September, 1957, P.A. 11, S. 19; 1959, P.A. 28, S. 57; 1961, P.A. 425, S. 6.)

Sec. 17-271. Forfeiture for bringing indigent person into a town. Section 17-271 is repealed.

(1949 Rev., S. 2583; 1961, P.A. 425, S. 6.)

CHAPTER 308

SUPPORT

PART I

BY TOWNS

Sec. 17-272. "Town" and "selectmen" defined. The words "town" and "selectmen," wherever they occur in the statutes relating to the care and maintenance of the poor or to the care and custody of neglected or uncared-for children, mean, respectively, the municipality liable, either temporarily or permanently, for the care and support of such poor and the care and control of such children and the board, officer or commission whose duty it is to care for such poor or such children, either temporarily or permanently.

(1949 Rev., S. 2584.)
See Sec. 7-127.

Sec. 17-273. Liability of town for support. Each person who has not estate sufficient for his support, and has no relatives of sufficient ability who are obliged by law to support him, shall be provided for and supported at the expense of the town in which he resides or, if he has no residence, of the town in which he becomes in need of aid. As used herein, the term "reside" means "occupy an established place of abode." When such person is in need of hospital or convalescent home care, it shall be similarly provided, but that portion of the cost not reimbursed by the state under the provisions of section 17-292 shall be chargeable to the town in which the person resided continuously for the longest period of time in the two years immediately prior to the granting of such hospital or convalescent home care, if such town is other than the town in which he resided or was located when he became in need of such care.

(1949 Rev., S. 2585; 1961, P.A. 425, S. 1.)

Meaning of the word "belong." 3 C. 467; 69 C. 4. Town from which a pauper is sent to jail is liable for support furnished by keeper of jail which is located in another town. 5 C. 185. Town liable for support of slave. 8 C. 393. What constitutes "sufficient estate" for support. 52 C. 200; value less equitable estate is not; 71 C. 724; income of ten dollars a week may not be. 76 C. 152. Mere ownership of property did not mean relative had "sufficient ability" to support. 126 C. 192. Town which furnishes support to person belonging to another town does not take risk that there may later be found relatives of ability to support. Id. Relatives "obliged by law" to support means persons who can be compelled by legal process to do so. Id. Cited. 115 C. 519; 116 C. 539; 123 C. 269; 127 C. 59; 134 C. 63; 139 C. 472; 146 C. 686; 149 C. 220, 221, 226.

Sec. 17-273a. Districts for administration of general assistance. Any two or more towns, by vote of their respective legislative bodies, may establish a district for the administration of general assistance and make agreements as to employment of personnel, payment of expenses and any other matters relevant to the operation of the district; and each such town may make appropriations for the payment of its agreed share of expenditures of the district.

(1961, P.A. 345, S. 1.)

See Sec. 17-3a.

Sec. 17-273b. Assistance to employable person prohibited, when. No assistance or care shall be given under this part to an employable person who has not registered with the nearest local employment agency of the labor department or has refused to accept a position for which he is fitted and which he is able to accept. This shall not apply to any person who cannot register with such employment agency because of being over sixty-five years of age, health or other disability.

(1963, P.A. 543.)

See Sec. 17-281a.

Sec. 17-274. Medical treatment. Each town shall provide medical treatment by one or more competent physicians for all persons liable to be supported by such town, when such persons are in need thereof, and each town shall furnish necessary hospitalization for all persons liable to be supported by such town or unable to pay for the same over a reasonable period of time; but no town shall provide such medical treatment or hospitalization by contract by auction to the lowest bidder. Any person receiving medical treatment or hospitalization hereunder shall make to the selectmen full disclosure of his financial condition as provided in section 17-278, but failure to make such disclosure shall not affect the obligation of such town to furnish medical treatment or hospitalization to any person otherwise eligible, if adequate information is made available to the town from other sources to indicate that such person is entitled to medical treatment or hospitalization hereunder. The physician or hospital shall comply with the notice provisions of section 17-284 giving information as to the name, address, age and financial status of such person within five business days of the beginning of treatment or hospitalization. If such notice is given within such five business days, the obligation of the town shall commence at the beginning of treatment or hospitalization; if such notice is not given within such five business days, the obligation of the town shall commence at the time of notice.

(1949 Rev., S. 2586; 1959, P.A. 572, S. 1; February, 1965, P.A. 96; 1971, P.A. 187.)

Former statute: Town held liable for hospital bills even though person failed to disclose her financial condition. 146 C. 686.

Sec. 17-275. Contracts with Institute of Living for support of mentally ill. The selectmen of any town may contract in its behalf with the officers of the Institute of Living at Hartford for the support of any mentally ill person for whom such town is required to furnish support.

(1949 Rev., S. 537; 1961, P.A. 425, S. 5.)